Supreme Court, U. S.
FILED
APR 18 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1596

GILBERTO LOPEZ,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION FIRST DEPARTMENT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1978

GILBERTO LOPEZ,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Gilberto Lopez prays that a writ of certiorari issue to review a judgment of the Appellate Division of the Supreme Court of the State of New York, entered January 4, 1979 affirming a judgment of conviction rendered against petitioner in the Supreme Court of the State of New York, Bronx County, convicting petitioner of the crime of murder in the second degree.

OPINION BELOW

On January 4, 1979 the Supreme Court of the State of New York, Appellate Division, First Department, affirmed the judgment of conviction in the attached opinion (see Appendix 2A, 3A). On February 5, 1979 leave to appeal to the Court of Appeals of the State of New York was denied. (See Appendix 4A).

JURISDICTION

The judgment and order of the Supreme Court of the State of New York, Appellate Division, First Department is dated January 4, 1979. Jurisdiction of this Court is invoked, made and conferred under Title 18 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Was prosecutorial misconduct pervasive throughout the trial so gross as to deprive petitioner of his right to a fair trial?

2. Were the Court's rulings during the trial and charge to the jury so fundamentally in error as to violate petitioner's due process rights?

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5th Amendment:

". . . nor be deprived of life, liberty or property without due process of law."

14th Amendment:

". . . no state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; . . ."

STATEMENT OF THE CASE

An argument over a $5.00 loan advanced by petitioner to the deceased resulted in a fight that ended with the borrower, the deceased, being shot. Petitioner testified that the deceased was shot by his own weapon during a struggle that pitted the deceased, a larger, heavier and younger man, and the deceased's friends against petitioner, a slight man who had lost the use of his left arm when in his youth he had been hit by a stray bullet at a baseball game. Petitioner, fearful for his and his daughter's lives, tried to prevent the deceased from drawing his revolver from his belt and while the deceased and petitioner were struggling the gun accidentally discharged. Petitioner was immediately set upon by the deceased's friends but managed to escape with his daughter while receiving severe blows. Petitioner returned home with his daughter and waited for the police in a neighbor's apartment. At the police station petitioner related these events

to a detective and later to an Assistant District Attorney from the Bronx District Attorney's office.

Petitioner's testimony was corroborated by defense witness Vincent Reyes, who was accused by the prosecution of having received payment for his testimony from the petitioner and his attorney. These accusations made before the jury were without basis and asked in bad faith as were also the questions put to Mr. Reyes concerning his prior criminal record. Mr. Reyes was asked whether he had murdered, robbed, burglarized, etc.

In another breach of prosecutorial propriety, petitioner's character witness was asked to assume the facts of the case as presented by the prosecution witness—that petitioner shot the deceased in cold blood—in assessing petitioner's character.

Two prosecution witnesses testified that they witnessed the fight between petitioner and the deceased in a grocery store earlier that evening. Petitioner was driven home and returned later that evening to the social club next door where he approached deceased and shot him and then left unmolested. Other prosecution witnesses testified to seeing petitioner leave the club.

I

Prosecutorial misconduct pervasive throughout the trial was so gross as to deprive Petitioner of his right to a fair trial.

Most heinous was the prosecutor's questions of defense witness about being paid for his testimony:

"Q. And [Mr. Sokol] gave you money one of those times, didn't he?

A. No.

* * *

Q. Did [Mrs. Lopez] give you money?

A. No."

Absolutely nothing contained in the record or anything conveyed by Mr. Sokol, trial attorney for the petitioner, or the petitioner had a basis for making this outrageous accusation.

Equally improper was the prosecution's constant reference to petitioner and the defense witness "lying" and contrasting their mendacious conduct to the prosecutor's "honest" witnesses. With respect to the defense eyewitness Vincent Reyes, the prosecution engaged in abusive and sarcastic cross-examination concerning the witness' prior criminal record asking whether he had been convicted of crimes that the prosecutor knew that this witness had not even been charged as attested by the arrest record the prosecution had. In addition, the prosecution demeaned petitioner's severe injury to his left arm, his wife's conduct and defense counsel by stating that defense counsel was deliberately misstating the facts. Further, the prosecutor imposed himself as the 13th juror, by stating "we must believe;" made a thinly veiled appeal to the racial prejudice of the jury by arguing, "the type of defense we are going to hear" and concluded his summation with a call for vengeance. The prosecution accused petitioner of not telling the entire story to the authorities. *Doyle v. Ohio,* 426 U.S. 610. And during the trial, disregarded the court's ruling as to questioning a prosecution witness as to when his friendship with petitioner ended and the answer was when petitioner shot the deceased.

When cross-examining the petitioner's character witness the prosecutor posed questions assuming the facts of the case on trial as presented by a prosecution witnesses asking him if his opinion would change if he knew *that the petitioner had killed the deceased in "cold blood."* (Emphasis supplied).

In *Michelson v. U.S.*, 335 U.S. 469, this Court held that cross-examination of character witnesses must be closely controlled by the trial court in accordance with commonlaw rules of evidence. This commonlaw rule of evidence that a character witness not be questioned concerning his personal opinion of the character of an accused but solely on his knowledge of the

accused's reputation in the community. Asking the character witness to assume petitioner's guilt of the crime, the question reserved for the jury, was so fundamentally prejudicial as to deprive petitioner of a fair trial.

As this Court stated in *Berger v. U.S.*, 295 U.S. 78, 89:

> "We have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with the probable cumulative effect upon the trial which cannot be disregarded as inconsequential."

See also *Taylor v. Kentucky, infra.*

II

This Court has held that a person accused of a crime is entitled to have his guilt or innocence determined solely on the basis of evidence introduced at trial and not on the incidental but extraneous circumstances such as the returning by the Grand Jury of an Indictment. *Estelle v. Williams,* 425 U.S. 501. I was fundamental error of constitutional dimensions to charge the jury in this case:

> "Since the indictment itself is the best evidence of the charges against the defendant, I will read each charge as it is written in the indictment."

This instruction given by the trial court offends a principle so rooted in tradition—an indictment is not proof of the crimes charged in such indictment—that conviction of an accused on the basis of such charge must be deemed to be a deprivation of due process. *Patterson v. New York,* 432 U.S. 197. The charge to the jury that an indictment is the "best evidence of the charges" would permit a jury to convict on less than proof beyond a reasonable doubt. Likewise, the trial court's charge that the jury could find guilt where it has "a feeling an accused might not be guilty" dilutes the concept of reasonable doubt and presumption of innocence fundamental to our system of

laws. *In Re Winship,* 397 U.S. 358. A lawyer might understand that the Court misspoke. However, an ordinary citizen taking the law from the Court, as it must, would conclude that the indictment was proof of the charges and that if a jury believed petitioner to be not guilty conviction was still required. *Taylor v. Kentucky,* 436 U.S. 478.

CONCLUSION

This Court should grant petitioner's request for a writ of certiorari and entertain briefs and arguments on the merits.

Respectfully submitted,

MANUEL NELSON ZAPATA
Member of the Bar of the
United States Supreme Court

APPENDIX A—ORDER OF AFFIRMANCE ON APPEAL FROM JUDGMENT

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on 4th day of January 1979

Present—Hon. Vincent A. Lupiano, Justice Presiding
Samuel J. Silverman
Arnold L. Fein
Leonard H. Sandler
Joseph P. Sullivan, Justices.

The People of the State of New York,
Respondent,

-against-

Gilberto Lopez,
Defendant-Appellant.

Order of Affirmance on Appeal from Judgment
4241

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, Bronx County (Grey, J.), rendered on November 10, 1977, convicting defendant, after a jury trial, of murder in the second degree, and said appeal having been argued by Mr. Manuel Nelson Zapata of counsel for the appellant, and by Mr. Leonard G. Kamlet of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER: JOSEPH J. LUCCHI
Clerk.

Counsel for appellant is referred to §606.5, Rules of the Appellate Division, First Department

APPENDIX B—DECISION

Lupiano, J.P., Silverman, Fein, Sandler, Sullivan, JJ.

4241

The People of the State of New York,
Respondent,
L.G. Kamlet

-against-

Gilberto Lopez,
Defendant-Appellant.
M.N. Zapata

Judgment, Supreme Court, Bronx County (Grey, J.), rendered November 10, 1977, sentencing defendant to imprisonment for 15 years to life, after conviction of defendant by a jury, of murder in the second degree, is unanimously affirmed.

Considering the case as a whole, and the strength of the evidence against the defendant, we do not think a reversal is warranted.

However, we take this opportunity to state the following cautions:

We disapprove of the district attorney's repeated use of the word "lie" in commenting on the defense testimony. The use of invective is particularly inappropriate by a representative of the

district attorney in addressing a jury; it militates against the calm atmosphere in which judicial proceedings should be conducted. There are other ways of telling the jury that evidence is wilfully false without the use of fighting words.

The district attorney also should not have asked defendant's character witness whether he would change his opinion of defendant's character if he heard that defendant had committed a cold-blooded murder, obviously referring to the case on trial. The question improperly assumed that the defendant was guilty of the crime with which he was charged, the very issue toward the determination of which the character evidence was offered.

Order filed.

APPENDIX C—CERTIFICATE DENYING LEAVE

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. JACOB D. FUCHSBERG, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

GILBERTO LOPEZ

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. Insufficient ground indicated for an oral hearing of this application.

Dated at New York, New York
February 5, 1979

s/ Jacob D. Fuchsberg
Associate Judge

*Description of Order: Order of the Appellate Division First Department dated January 4, 1979 affirming judgment of the Supreme Court, Bronx County rendered on November 10, 1977.

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GILBERTO LOPEZ,

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vs.

STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

Questions Presented

1. Whether petitioner is precluded from obtaining relief in the Federal Courts by virtue of having intentionally declined to raise in the state appellate courts the constitutional issues which provide the basis of his petition.

2. Whether petitioner was prejudiced at trial by the prosecutor's cross-examination of witnesses, his summation and the court's charge.

3. Whether the errors, if any, were harmless beyond a reasonable doubt.

Statement of the Case

Petitioner was indicted by the Bronx County Grand Jury in connection with the slaying of Rafael Sanchez and, on November 10, 1977, following a trial by jury, was convicted of Murder in the Second Degree.

THE TRIAL

The People's Case

The Shooting

Between about 11 and 11:30 p.m. on February 27, 1976 Gilberto Lopez, petitioner herein, and Rafael Sanchez were in a "bodega" (grocery store) adjacent to the El Bario Social Club, located at Tiffany Street and Westchester Avenue, when petitioner asked Mr. Sanchez for payment of a five-dollar debt (E. Maldonado: 180-82; Maysonet: 220-21; R. Maldonado: 319-20).* A heated argument ensued, the two were separated, and petitioner was taken outside (E. Maldonado: 182; Maysonet: 221-23; Matos: 273-74; R. Maldonado: 320-21). During the fight, Roger Maldonado observed petitioner with a green knife and told him to put it away (R. Maldonado: 321-22). Also present during part of the argument was Romonita Rosado who, at one point, heard petitioner say, "I am going to kill him" (Rosado: 350). Grimaldi Matos also heard petitioner say, sometime that night, that either he or Mr. Sanchez would be killed (Matos: 227, 315-16).

After petitioner was removed from the bodega, he was taken home by Eugene Maldonado (E. Maldonado: 224;

* Numerical references are to the stenographic minutes of trial.

Rosado: 376). Petitioner's daughter was neither with him at this time nor was she at the club or bodega at any time earlier or later that evening (E. Maldonado: 183; Matos: 283; Rosado: 361).

Later, around 12:30 a.m., February 28, 1976, Mr. Sanchez was sitting in the social club next to the bodega, with his head on his hands resting on a pool table (Rosado: 351-52; Delgado: 245-46; Maysonet: 234; Morales: 127-28). Petitioner walked into the club, approached Mr. Sanchez to within three to four feet, stated "I was going to kill you," and fired a gun striking Mr. Sanchez in the left side. His victim jumped up facing petitioner and was struck a second time, by a bullet from petitioner's gun, penetrating his chest just above the left nipple (Hyland: 30-32; Morales: 130; Rosado: 352, 358; E. Maldonado: 198, 206). It was later determined that Mr. Sanchez died of these gunshot wounds which penetrated his heart, lungs and liver (Hyland: 32).

When the shots were fired, several people were standing outside on the street and heard two shots. Seconds later, petitioner was seen leaving the club, stepping quickly backwards with a gun in his hand (E. Maldonado: 184-85; Maysonet: 225-26, 236-37; Delgado: 247-48; Matos: 276-78; R. Maldonado: 322-23, 331).

The Investigation and Arrest

Shortly after the shooting, Police Officer James McDonagh, while on patrol in the vicinity of the incident, was flagged down (McDonagh: 18-19). The officer then went into the social club to investigate and found Rafael Sanchez

lying on the floor while Roger Maldonado was unsuccessfully attempting to revive him (McDonagh: 20-21; R. Maldonado: 324).

Responsibility for the investigation was given to Detective Kenneth Drummond who responded to the club at about 1:00 a.m. (Drummond: 73; McDonagh: 24). The detective then went to petitioner's home. After trying to gain entrance to petitioner's apartment for over a half hour, defendant's neighbor across the hall opened her door and informed Detective Drummond that petitioner was inside her apartment (Drummond: 75-76). Petitioner was then arrested.

Oral Statement of Defendant to Detective Drummond

After being advised of his constitutional rights, petitioner stated that he played pool in the social club that evening starting at 7:00 p.m. He claimed that he had an argument with "Baby" (Rafael Sanchez) about money owed him and a fist-fight ensued. Afterwards, he took a cab home with his daughter. When he arrived home, petitioner stated, he told his wife about the fight and that "something bad happened" to "Baby." They then went to stay at a neighbor's apartment (Drummond: 76-79).

Recorded Statement of Petitioner to A.D.A. Birnbaum

Later, at about 5:30 a.m., Assistant District Attorney Barry Birnbaum responded to the police precinct and, after advising petitioner of his rights, elicited a statement by petitioner which was stenographically recorded (Drummond: 79; Vidal: 116-19; Kitchen: 158-61). Petitioner stated that he had an argument in the social club with

Rafael Sanchez about money. At one point, petitioner claimed, Mr. Sanchez said that he was going to kill petitioner and his daughter. When Mr. Sanchez took something from his belt, petitioner stated, he jumped at him and grabbed him. Others intereeded and when petitioner was taken outside he and his daughter went home in a cab. Petitioner continued, stating that he changed clothes when he got home because he was expecting the police, since as he was getting into the cab, someone told him Mr. Sanchez had been hurt. Petitioner waited for the police in a neighbor's apartment, however, because he feared retaliation by Sanchez' brothers (Kitchen: 163-79).

The Defense

Jenny Lopez, petitioner's wife, testified that on the night of the shooting petitioner left home with their daughter at about 7:00 p.m. (J. Lopez: 401, 405). A few minutes after 11:00 p.m., the witness stated, she went to the El Bario Social Club only to learn from someone that petitioner had just gone home (J. Lopez: 407). Upon returning home they then went to a neighbor's apartment (J. Lopez: 408). Mrs. Lopez also testified that petitioner neither told her that they were going to their neighbor's apartment to wait for the police nor that they were going there because he feared Rafael Sanchez' brothers (J. Lopez: 417).

Victor Reyes, an acquaintance of petitioner also testified, stating that on the night in question he went to the club at about 8:30 p.m. and that petitioner and his daughter were present (Reyes: 422-23). Later, he saw Mr. Sanchez walk into the club (Reyes: 428). He stated that at some point a fight broke out. Mr. Sanchez came toward defend-

ant with his right hand placed by the left side of his waist at which time petitioner grabbed Sanchez about the waist (Reyes: 430-35). Suddenly, Reyes testified, two shots rang out (Reyes: 434). He also stated that petitioner was in the club at all times from 8:30 p.m. until the shooting occurred (Reyes: 451). Reyes further admitted that he had been previously convicted for narcotics offenses on two occasions and once for possession of burglar tools. Although, he had been convicted on other occasions, he could not recall the number or the nature of these additional convictions (Reyes: 437-39).

Harry Rosen, petitioner's employer for twenty-eight years, testified that his reputation for peacefulness was good (Rosen: 884-85).

Gilberto Lopez, petitioner herein, testified on his own behalf. He stated that on the afternoon of the shooting, he and his daughter went to the bodega located adjacent to the social club (G. Lopez: 495-96). According to petitioner, at about 5:35 p.m. he asked Rafael Sanchez to repay a five-dollar debt; they argued and petitioner was taken outside by some people who were present (G. Lopez: 499-500). He then went home with his daughter (G. Lopez: 501). Petitioner stated he then returned to the club, again with his daughter, after 6:30 p.m. (G. Lopez: 501-02). Rafael Sanchez entered the club at about 8:30 p.m. (G. Lopez: 507). Later, an argument again developed over Sanchez' debt (G. Lopez: 510). Petitioner claimed that Sanchez said that he would rather kill him than pay the money (G. Lopez: 511-12). A short time later, according to petitioner's testimony, Mr. Sanchez threatened petitioner and his daughter and came toward petitioner with his "hands toward the left side of his waistline" (G. Lopez: 512-13). Petitioner then "hugged him" about the waist while holding a pool cue in his right hand and suddenly two gunshots sounded (G. Lopez: 513-14). Petitioner stated that he could not use his left hand and was playing pool with only his right hand (G. Lopez: 534-35). Petitioner continued his testimony, stating that while he and Mr. Sanchez were struggling, although he never saw a gun, Sanchez tried to take something out (G. Lopez: 545). After Mr. Sanchez fell to the floor, petitioner and his daughter left and took a cab home. He stated that Eugene Maldonado, a friend of his, was not at the club and that he did not take him home. Petitioner did not know that Sanchez had been hurt until, when outside, someone told him he had been wounded (G. Lopez: 513-14, 541, 548, 550).

Petitioner further stated that after arriving home he later went to his neighbor's apartment with his wife and daughter to await the arrival of the police (G. Lopez: 520, 548). After being arrested, petitioner testified, he was taken, at about midnight, to the police precinct where he was questioned until 6:30 a.m. by an Assistant District Attorney (G. Lopez: 523-24). In that regard, petitioner stated that the stenographic statement which was admitted in evidence and reflects that questioning was initiated at 5:27 a.m., and was concluded at 5:50 a.m., is incorrect (G. Lopez: 539).

Rebuttal

Detective Kenneth Drummond, who had testified on the People's case in chief, stated that (1) he responded to the

social club at 1:00 a.m. (560); (2) he first saw petitioner at about 3:00 a.m. (561); and (3) the Assistant District Attorney arrived at the police precinct at about 5:00 a.m. (562).

The Appeal

On appealing his conviction to the Appellate Division of the Supreme Court, First Department, petitioner declined to premise his arguments upon federal constitutional grounds. Rather, he relied upon state principles of law. The Appellate Division of the Supreme Court, First Department unanimously affirmed petitioner's conviction on January 4, 1979. Petitioner then applied to the New York Court of Appeals for a certificate granting leave to appeal pursuant to Section 460.20 of the New York Criminal Procedure Law; leave to appeal was denied on February 5, 1979.

Petitioner subsequently moved in the Appellate Division of the Supreme Court, First Department to amend the remittitur to provide that certain questions pursuant to the Constitution of the United States were raised and necessarily passed upon by that court. On April 19, 1979, the Appellate Division of the Supreme Court, First Department denied petitioner's motion.

ARGUMENT

There is no important question of Federal Law.

Initially, this Court should decline to hear issues concerning matters never objected to at trial or attacked upon direct appeal on federal constitutional grounds. As to each error claimed by petitioner to have occurred, no objection was voiced at trial. On appeal to the Appellate Division of the Supreme Court, First Department, petitioner failed to premise his contentions upon the Federal Constitution. Obviously aware of the problem this would create in seeking federal relief, petitioner sought amendment of the remittitur to provide that certain questions pursuant to the Constitution of the United States were raised and necessarily passed upon. The Appellate Division of the Supreme Court, First Department, denied petitioner's motion. As a result of these failures, petitioner has effectively waived any claim in the federal courts. *Cf. Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Evan* v. *Maggio*, 557 F.2d 430 (5th Cir. 1977); *Frazier* v. *Czarnetsky*, 439 F. Supp. 735 (S.D.N.Y. 1977). Further, no issue exists in this petition which has not been treated by this Court and no conflict of decisions is presented herein.

Moreover, petitioner's claims are wholly lacking in merit.

A. Cross-Examination of Victor Reyes

Petitioner first contends that the prosecutor's questions put to Victor Reyes as to whether he had received money from either defense counsel or petitioner's wife were im-

proper and posed in bad faith. Not only did petitioner fail to object, he did not request an offer of proof to test the prosecutor's good faith. In light of petitioner's failure to take appropriate and necessary action no basis exists to assume the questions were improper.

B. Cross-Examination of Harry Rosen

Petitioner also argues that the prosecutor improperly cross-examined his character witness as to whether he would change his opinion of petitioner's character if he had heard that petitioner committed a cold-blooded murder. Petitioner's claim of error is that the questions assumed his guilt of the crime charged.

The questions were phrased hypothetically, however, with scant detail and no assumption of guilt can be gleaned from them. *Michelson* v. *United States*, 335 U.S. 218, 221 n. 17 (1948). Moreover, the questions were merely an attempt to ascertain whether the particular community in question employed the same standards of peacefulness as that of the community-at-large. They also went to the qualifications of the witness to bespeak the community opinion. *Michelson* v. *United States*, *supra* at 222.

C. The Prosecutor's Summation

Petitioner further claims that the prosecutor made certain intemperate remarks on summation. He asserts that use of the word "lies" or "lying" in reference to defense testimony was improper. Petitioner's failure to voice objection is not surprising since in the context of the numerous inconsistencies and improbabilities of the defense testimony, these comments must be viewed as fair with respect to the issue of credibility.

Petitioner next contends that the prosecutor became the "thirteenth juror" when he used the term "we." The use of this term was nothing more than a stylistic method of reviewing trial testimony, referring to what everyone in the courtroom heard.

D. The Charge

Lastly, petitioner alleged that the court's charge was erroneous. He claims that the language used by the judge, "since the indictment is the best evidence of the charges against the defendant," led the jury to believe that the indictment served as proof of guilt. This claim is spurious. The court clearly misspoke, obviously meaning to say "best statement." Further, the Court's charge explained to the jury, over and over again, that the indictment is evidence of nothing.

A final, strong concern militates against review by this Court. Even if it were to find petitioner's claim jurisdictionally sound and meritorious, reversal would not be in order since any error at trial was harmless beyond a reasonable doubt in light of the overwhelming proof of guilt. *Chapman* v. *California*, 386 U.S. 18 (1967). Two eyewitnesses saw petitioner shoot Rafael Sanchez; several other witnesses saw the two argue and fight earlier in the evening and heard petitioner threaten Sanchez; five witnesses saw petitioner leave the scene seconds after the shooting with a gun in hand; and petitioner's pre-trial statements and his trial testimony contained numerous inconsistencies.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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District Attorney
Bronx County
Attorney for Respondent

ALAN D. MARRUS
LEONARD G. KAMLET
Assistant District Attorneys
Of Counsel

July 1979